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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

PLANNED PARENTHOOD FEDERATION
 OF AMERICA, INC., et al.,

Plaintiffs,

v.

CENTER FOR MEDICAL PROGRESS,
 et al.,

Defendants.

Case No. 3:16-cv-00236-WHO

**PLAINTIFFS' RENEWED MOTION IN
 LIMINE TO EXCLUDE LATE DISCLOSED
 EVIDENCE**

Judge: Honorable William H. Orrick

1 Plaintiffs renew their motion to exclude all evidence of interactions that Defendants had
 2 with Abby Johnson, or information she allegedly provided.¹ Plaintiffs also move to restrict
 3 Defendants from offering evidence concerning the backgrounds or job responsibilities of Holly
 4 O'Donnell, Kristin Leu and Dr. Hurlbut.

5 **A. Procedural Background**

6 Two prior motions and Court orders are relevant to the instant motion.

7 **First**, on September 9, Plaintiffs moved to exclude several late disclosed witnesses
 8 including Abby Johnson. ECF No. 794. The Court excluded some witnesses but allowed
 9 defendants to bring certain witnesses including Johnson but only on the condition that Defendants
 10 to produce Johnson for deposition. ECF No. 835. Defendants did not produce Johnson for
 11 deposition.

12 The **second** relevant motion is Plaintiffs' Motion In Limine to Exclude Late Evidence. ECF
 13 No. 856. On September 29, the parties exchanged demonstratives for opening statements. One of
 14 Defendants' demonstrative—entitled “What Led David To Investigate”—asserted that information
 15 received from Dr. Hurlbut, Kristin Leu and Abby Johnson *led David to investigate*. Plaintiffs
 16 promptly filed their motion to exclude evidence of what these witnesses told Mr. Daleiden because
 17 Defendants had failed to disclose such information in discovery. The Court partially granted
 18 Plaintiffs' motion. ECF No. 861. That order had three components: (a) Defendants were precluded
 19 from referencing Hurlbut, Leu, McCurdy or Johnson in opening statements; (b) Daleiden was
 20 permitted to identify Hurlbut, McCurdy or Leu as individuals with whom he communicated but
 21 precluded from attributing any specific information he learned from any of them; and (c) as to
 22 Johnson, in light of the Court's prior order allowing her to testify subject to a deposition, the Court
 23 deferred further ruling.

24 The Court instructed that:

25 If, after her deposition, plaintiffs believe that given the nature of the interaction and
 26 communication between Daleiden and Johnson . . . should have been disclosed in

27 ¹ Plaintiffs refer the Court to Dkt. 856 for Plaintiffs original motion on this topic, and incorporate
 28 the arguments in that motion herein.

Daleiden's initial disclosures, interrogatory response, or his depositions (or that defendants have attempted to ambush plaintiffs by hiding the extent of Daleiden and Johnson's interactions) that issue should be briefed and submitted to me for reconsideration on their motion to exclude.

Dkt. 861 at 3. Defendants failed to offer Ms. Johnson for deposition in San Francisco. *Id.*

B. Defendants Should Be Precluded From Offering Evidence That Ms. Johnson Was a Source of Information Concerning Intent/Section 633.5 Due to Defendants' Failure In Discovery To Identify Ms. Johnson Or Any Information She Allegedly Provided

The Court should preclude Daleiden and all defense witnesses from testifying as to anything Ms. Johnson purportedly told them. Plaintiffs have no information about what Ms. Johnson purportedly told Mr. Daleiden and Defendants have effectively admitted their discovery failure. In opposing Plaintiffs' motion in limine to exclude late disclosed witnesses Defendants mustered a single email produced in discovery that contained no reference to or discussion of any communications between Ms. Johnson and any Defendant. *See* ECF 856 at 8 (discussing Defendants' argument in favor of allowing Ms. Johnson to testify).²

Allowing testimony regarding Ms. Johnson or anything she allegedly told Mr. Daleiden would be trial by ambush. With respect to former Stem Express employees and a Stanford professor, the Court has ordered that Daleiden may testify that he spoke to these individuals but not testify to the contents of what they said. Respectfully, Plaintiffs do not believe that such an approach is appropriate with respect to Ms. Johnson for at least three reasons. First, Defendants created this situation by failing to identify Ms. Johnson and then, after they had done so, failing to produce her for deposition. Second, and relatedly, because of Defendants' choice not to make Ms. Johnson available, Plaintiffs have no information regarding this supposed interaction--they do not know where, when, how, or even whether, it occurred. Third, Ms. Johnson formerly worked at Planned Parenthood Gulf Coast (well before Defendants began their investigation). If the Court allows any mention of her, even without specific information about what she said, the jury may put

²Defendants also referenced an unproduced a press release that also does not reference any communication between Ms. Johnson and any Defendant and a declaration filed by Daleiden after the close of discovery.

1 more weight on such information given her past connection to a Plaintiff. Because Plaintiffs have
 2 no information provided in discovery about Ms. Johnson, Plaintiffs are not in a position to
 3 effectively cross Defendants regarding the Ms. Johnson as a source--even if the specific information
 4 she provided is excluded. Therefore, the Court should exclude any mention of Abby Johnson.

5 **C. The Court Should Restrict Defendants' Testimony Regarding Late-**
 6 **Disclosed Evidence**

7 The Court has restricted Defendants' testimony regarding Holly O'Donnell, Kristen Leu, Dr.
 8 Hurlbut and Dr. McCurdy. Daleiden "may identify" each "as individuals with whom he
 9 communicated in support of his intent/Section 633.5 defense," but "he may not attribute any
 10 specific information he learned to these three." ECF 861 at 3. With respect to Ms. O'Donnell, Mr.
 11 Daleiden is permitted to testify that he spoke to Ms. O'Donnell and that the conversation supported
 12 his beliefs. ECF 804.

13 Plaintiffs anticipate that Defendants will draw out protracted testimony on their backgrounds
 14 to build up the importance and reliability of information purportedly communicated to Daleiden—
 15 information whose substance will be left to the jury's imagination. Plaintiffs understand that
 16 Defendants may need to identify where they worked or their job title, but they should not be
 17 permitted to go into detail beyond that. Plaintiffs request the Court to restrict such testimony as it
 18 would unfairly circumvent the purpose of the Court's orders, which is to avoid unfair surprise on
 19 Plaintiffs due to Defendants' late disclosures.

20 **CONCLUSION**

21 For the foregoing reasons, Plaintiffs renew their motion to exclude any evidence that
 22 Defendants were investigating Plaintiffs based on information allegedly provided to them by Ms.
 23 Johnson. Plaintiffs also move to exclude testimony regarding late-disclosed evidence of witnesses,
 24 other than their name, employer(s) and that they were "individuals with whom [Daleiden]
 25 communicated in support of his intent/Section 633.5 defense."

26 Dated: October 19, 2019.

27 Respectfully submitted,

28 **ARNOLD & PORTER KAYE SCHOLER LLP**

ROGERS JOSEPH O'DONNELL

By: /s/ Sharon D. Mayo

SHARON D. MAYO

Attorneys for Plaintiffs